SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1365

RANGER INSURANCE COMPANY,

Petitioner,

v.

MIRIAM G. CULBERSON, Executrix, and CAROL BROWN MACLEAN, Executrix,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Ranger Insurance Company ("Ranger"), respectfully prays for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered December 28, 1971.

Opinions Below

The opinions[1] of the United States District Court for the Northern District of Georgia and the opinion of the

[1]This petition evolves from two separate actions decided on motions for summary judgment at the trial court level. *Ranger*

United States Court of Appeals for the Fifth Circuit are not yet officially reported, but appear in 11 Avi. L. Rptr. 18074 and 12 Avi. L. Rptr. 17172 respectively and in Appendix A hereto as 1a, 7a, 13a and 15a respectively.

Jurisdiction

The court of appeals' opinion was entered December 28, 1971 (A. 15a). Ranger's petition for rehearing and rehearing *en banc* were denied January 26, 1972 (A. 42a). The court of appeals judgment and mandate (A. 44a) was stayed by order of February 11, 1972, pending filing of this petition on or before April 25, 1972 (A. 46a). This petition is timely filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. May the court of appeals in a diversity action ignore and fail to even cite a controlling decision of the

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Insurance Co. v. Culberson, N.D. Ga., C.A. No. 12362, was commenced on January 13, 1969 and involves a $10,097.12 claim by Ranger against the Culberson estate for the aircraft hull loss under Ranger's subrogation rights pursuant to the aircraft policy's "breach of warranty endorsement." *MacLean v. Culberson v. Ranger Insurance Co.*, N.D. Ga., C.A. No. 12886 was commenced on July 16, 1969 and is a $750,000.00 wrongful death action brought by the Executrix of the deceased passenger ("MacLean") against the estate of the deceased ("Culberson"); a third party action was instituted on September 12, 1969, against Ranger on Culberson's aviation liability insurance policy. Ranger appealed as a matter of right the district court order granting the cross-motion for summary judgment to Culberson's Executrix in No. 12362 and appealed pursuant to Rule 54(b), Fed. R. Civ. P., the district court order granting Culberson's motion for summary judgment on the third party claim in No. 12886. The appeals were consolidated by the appellate court as No. 71-1515 pursuant to Rule 3(b), Fed. R. App. P.

Georgia Court of Appeals decided only two weeks previously and involving the same provision of the same aviation insurance policy and hold that coverage exists where the state court has unequivocally held that it does not.

2. Whether the circuit court's basing of its decision on an *assumption* directly contrary to the undisputed facts in the record calls for an exercise of this Court's power of supervision.[2]

Statement of the Case

The district court had jurisdiction under 28 U.S.C. §1332 over the concurrently decided diversity actions involving unambiguous aviation liability and hull damage insurance policy provisions affecting claims exceeding $10,000.00 in each action.

Nature of the Cases

Before this Court on petition for writ of certiorari are two cases consolidated for disposition on appeal both of which turn on the question of whether, as a matter of law, coverage under an aircraft insurance policy issued to William A. Culberson was *suspended* at the time of the crash during a violent thunderstorm in New Jersey on August 30, 1967 which was fatal to both Culberson and his passenger, MacLean, and which resulted in a

[2]Ranger further believes that the trial and appellate courts also erred in rejecting Ranger's contentions with respect to two policy exclusion provisions (A. 4a-5a, 30a-32a). Similarly, Ranger submits that the circuit court's reliance upon Rule 8(c), Fed. R. Civ. P. (A. 22a n.1) is erroneous. While Ranger does not urge these errors as grounds for granting this petition, it reserves the right to do so in its brief on the merits if this petition is granted.

total loss to the aircraft. Ranger submits that coverage was suspended and that it was reversible error to hold Ranger liable under the policy for either the personal injury claims or aircraft hull loss.

The Evidentiary Record

Culberson's application to Ranger for an aviation liability and hull damage insurance policy stated that he held an FAA private pilot certificate with a single engine rating and a total of 100 logged hours, 15 in retractable gear aircraft, while other pilots who would be permitted to fly the insured aircraft were required to hold a pilot certificate and 200 total logged hours, 25 in retractable gear aircraft. On the basis of that application information, much of which was copied directly into the policy declarations, Ranger issued its policy No. AC1-107096 which provided, *inter alia*:

> "Item 7. Pilot clause: Only the following pilot(s) will operate the aircraft while 'in flight' and while holding proper pilot certificate(s) with appropriate ratings as required by the Federal Aviation Agency:
>
> W. A. Culberson or any other private or commercial pilot having a minimum of 200 total logged hours, including at least 25 hours in retractable gear aircraft."

In addition to the foregoing basic policy, Ranger attached thereto a standard form endorsement rider on which were checked only those specific endorsements Ranger considered necessary on the basis of the information Culberson supplied in his policy application. In his uncontradicted affidavit submitted in support of Ranger's summary judgment motion in the district court,

Ranger's Senior Vice President who wrote the Culberson policy testified:

> "There are many variations of the endorsements which are used depending upon the particular risk involved. For convenience the endorsements are printed together to be attached to the basic policy, the applicable endorsement being indicated by an 'X' on the endorsements page. Many such endorsement pages exist, one example of which can be found as endorsement page number one to the policy issued to Mr. Culberson.
>
> Item Four on endorsement page number one, [a provision mentioning student pilots which was relied upon by the court of appeals majority] which was not a part of Mr. Culberson's policy, is never used where a policy is issued to an individual insured. Item four is only added as an exclusion to a policy written for a 'flying club.' The reason for the exclusion contained under number four of the endorsement page number one is that in the company's underwriting experience flying clubs are particularly prone to violations of the Federal Aviation Administration regulations mentioned therein. For example, the company's experience is that flying club members quite often violate the recent flight experience requirements of Section 61.47 of the Federal Aviation regulations relating to the number of takeoff and landings required in the last ninety days before a pilot may fly with passengers. Because of that particular hazard which substantially increases the risk an underwriting decision was made to add to all flying club policies the exclusion contained in Item Four. Except for the happenstance that Items One and Two were applicable to Mr. Culberson's situation Item Four would not have even been included in the policy pack-

age issued to Mr. Culberson since it has no relevance to a policy written for an individual insured.

Item Three of that same endorsement page is added whenever the company is informed that a student pilot is to fly the aircraft. Had Ranger Insurance Company been informed that Mr. Culberson held only a student pilot license it would have required the addition of the endorsement numbered three on endorsement page one. If that endorsement had been applied to the policy Mr. Culberson would have had no coverage at any time during the flight in which he met his death because it was not under the direct supervision of a flight instructor. However, Ranger Insurance Company had no knowledge that Mr. Culberson had only a student pilot license as it had been represented to the company that he held a private pilot license with a single engine rating. Attached to this affidavit is a copy of the application for insurance which was the company's only knowledge with regard to Mr. Culberson's flying licenses and ratings."

In fact, Culberson held only a "student pilot" certificate which contained the following limitation on its face in two places:

"LIMITATIONS–PASSENGER CARRYING PROHIBITED"

MacLean held no pilot certificate at all.

There is no dispute that Culberson crashed during a thunderstorm while carrying MacLean as a passenger and in direct violation of the prohibition against carrying passengers which was a part of his "student pilot" certificate. As a result, at the time of the accident, Culberson

was without the "proper pilot certificate" required for compliance with the policy "pilot clause."

As Judge Dyer in his appellate court dissent observed (A. 37a-38a):

> The limitations of coverage in the policy are perfectly clear and Culberson was bound by them. He knew that his student pilot certificate prohibited him from carrying passengers any time, any where. He knew that the "Including Passengers" provision would only be applicable when either a private or commercial pilot certificate holder, as specified in his policy, was flying the aircraft with passengers. He knew that his policy required him to have a proper pilot certificate. This could only mean that he was within the policy coverage if he flew the aircraft alone and that there would be no coverage while passengers were aboard.

Notwithstanding the uncontroverted evidentiary record outlined above, the circuit court majority erroneously concluded that it "must *assume* that Ranger fully intended to insure a student pilot" because Ranger did not check the student pilot exclusion on its form endorsement rider (A. 21a) and therefore affirmed the district court judgment holding that there was coverage during the period of Culberson's non-compliance with the policy "pilot clause" provisions.

Reasons For Granting The Writ

The errors of the circuit court cry out for correction by this court. Not only has the circuit court directly ignored controlling state law to substitute its own view, it has cast doubt on the validity of the thousands of aviation insurance policies issued annually in this coun-

try thus adversely affecting both insureds and insurers.[3] As the matter now stands neither insured nor insurer knows the meaning of this keystone clause in aviation insurance coverage. The bench, the bar and the public have an urgent need for this Court to review this case involving an issue of substantial public importance.

1. *Under the rule of* **Erie** *the circuit court was required to follow controlling Georgia law and to hold that, under the facts, aviation liability insurance coverage was suspended.*

Since 1938 when it decided *Erie R. Co. v. Thompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, this Court has continuously held in civil diversity cases that on matters of substantive law the Federal courts must follow the appropriate state law. *See generally*, 1 Barron and Holtzoff, *Federal Practice* §8; p. 32 (Wright ed. 1960); 1A Moore's *Federal Practice* ¶0.306, p. 3201 ff (1959). Further, this Court, applying *Erie* has held that state law governs the interpretation to be given a specific provision of an insurance contract. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 205, 58 S. Ct. 860, 861 (1938); *New York Life Ins. Co. v. Jackson*, 304 U.S. 261, 58 S.Ct. 871 (1938) (per curiam). "For purposes of diversity jurisdiction a federal court is 'in effect, only another court of the State.'" *Angel v. Bullington*, 330 U.S. 183, 187, 67 S.Ct. 657, 659 (1947); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 108, 65 S.Ct. 1464, 1469

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[3]There are 714,778 active pilots in the United States and 133,814 aircraft eligible for civil aircraft registration. *Federal Aviation Administration Statistical Handbook of Aviation* (December 1970). *Selected Regional Statistics, Department of Transportation, Federal Aviation Administration* (October 1971).

(1945). The reason underlying the *Erie* rule was clearly expressed by this Court in *York:*

> Erie R. Co. v. Thompkins was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies Erie R. Co. v. Thompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result.

326 U.S. at 108, 65 S.Ct. at 1470. What has happened in the instant case is precisely what this Court sought by *Erie* to avoid.

In *The Farmers and Merchants Bank of Manchester v. Ranger Insurance Company,* 125 Ga. App. 166, S.E.2d (1971), *certiorari denied* by Supreme Court of Georgia (Feb. 28, 1972) (*see* Appendix B hereto), the Georgia Court of Appeals dealt with a fact situation identical to that in the instant case: Ranger Insurance Company issued a liability and hull damage insurance policy to John C. Loftin. An accident occurred while Mr. Loftin, holding only a "student pilot" certificate, was operating the insured aircraft with a passenger in violation of the express limitations of his FAA certificate prohibiting passenger carriage. As with the instant case, the Ranger policy" pilot

clause" in *Farmers and Merchants Bank* conditioned coverage upon operation of the aircraft in flight by Loftin (or any other pilot having a minimum of 300 total logged hours) *while holding appropriate FAA pilot certificate and ratings* (A. 2b). The Georgia Court of Appeals, agreeing with the rationale of *National Insurance Underwriters v. Bequette,* 280 F.Supp. 842 (D.Alaska 1968), held that for that flight with a passenger in violation of insured's FAA "student pilot" certificate and the policy pilot clause there was no coverage (A. 3b).[4]

On December 14, 1971, following denial of rehearing by the Georgia Court of Appeals of its decision in *Farmers and Merchants Bank,* Ranger filed with the circuit

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[4]Both *Bequette* and *Farmers Merchants Bank* hold that coverage was "excluded" for the flight without the appropriate FAA certificate required by the pilot clause. Relying on the rationale of the Fifth Circuit's decision in *Lineas Aereas Columbiana Expresas v. Travelers Fire Ins. Co.,* 257 F.2d 150 (5th Cir. 1958), Ranger has generally considered that "suspension" rather than "exclusion" of coverage is the more appropriate term for the period when an insured operates the aircraft without a proper certificate. As the Fifth Circuit recognized in *Lineas:*

> It is just such consideration that has led to the development of the principle expressly acknowledged by Lace [the insured] in the briefs here, of *suspension of coverage.* It is, of course, true that development of the law along these lines has come from the desire to avoid an outright forfeiture. Consequently, coverage is not permanently destroyed. It is suspended so long as, but only so long as, the violations of the specified basic policy requirements continue.

257 F.2d at 155. However, if a loss occurs during the uncovered period, the effect is identical whether coverage is considered "excluded" or "suspended": the insurer is *not* liable for any loss.

court[5] a supplemental brief attaching thereto as Exhibit A a certified copy of the state court decision and arguing as above that *Farmers and Merchants Bank* is controlling and requires reversal of the district court with directions that summary judgment be entered for Ranger in both cases.

In its decision of December 28, 1971—12 days after receipt of Ranger's supplemental brief—the circuit court *failed to consider or even to cite* the controlling *Farmers and Merchants Bank* case. The issue in the state court case and the instant Federal court actions is identical: is coverage suspended when a student pilot operates the insured aircraft with a passenger aboard in violation of his FAA certificate limitations and without the "proper certificate" required by the policy pilot clause. Disregarding clear state law and policy and ignoring *Erie*, the circuit court majority erroneously held there was coverage. The opinion of the dissenting judge, on the other hand, was consistent with the Georgia decision and should have been the decision of the circuit court.

While the majority opinion in this case recognized that Georgia law, under the *Erie* principle, was controlling, citing *Float-Away Door Co. v. Continental Casualty Company*, 372 F.2d 701 (5th Cir. 1967), *cert. denied*, 389 U.S. 823, 88 S.Ct. 58 (1967) and *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020 (1941) (A. 17a), it disregarded the *Farmers and Merchants Bank* case and held that there is coverage in an identical factual situation where a Georgia court has held there is no coverage, thus violating the very *Erie* principle which it acknowl-

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[5]The certifed mail return receipt indicated that circuit court Deputy Clerk Hill received the supplemental brief on December 16, 1971.

edges to be controlling in these diversity insurance contract actions.

In its petition for rehearing and rehearing *en banc*, Ranger specifically argued that *Farmers and Merchants Bank* was controlling and that the circuit court's conflicting decision should be reversed on rehearing with directions that judgment be entered for Ranger. Again that state court decision was appended to the Ranger petition. Again the circuit court ignored, failed to cite or apparently even consider the controlling state case[6] and summarily denied Ranger's petition, with Judge Dyer dissenting for the reasons originally stated (A. 43a).

This Court should grant certiorari in this case to insure that its long-established *Erie* principle will be followed by the circuit court and the conflict created between the Federal and State Courts eliminated.

2. *The circuit court's erroneous and factually unsupported "assumption" that Ranger "fully intended to insure a student pilot" on on the basis of which the circuit court circumvented the* Erie *principle calls for this Court to exercise its power of supervision.*

The circuit court majority circumvented *Erie* by resorting to *assumption* of unwarranted facts to abrogate

[6]Ranger deserved to be shown the same concern for evolving and controlling state law in the instant case that the Fifth Circuit showed the tobacco industry in *Green v. American Tobacco Co.*, 304 F.2d 70, on rehearing certification of question to Florida Supreme Court, 304 F.2d 86 (5th Cir. 1962), rev'd and rem'd in accordance with state court decision, 325 F.2d 673 (5th Cir. 1963) applying 154 So.2d 169, Fla. 1963), cert. denied 377 U.S. 943 (1964), where newly decided state law was recognized by the Fifth Circuit as controlling despite an initial decision to the contrary.

the plain "pilot clause" language. Judge Dyer, in his dissent, stated (A. 36a):

> It bears repeating that Ranger did not know and was not charged with knowledge that Culberson held a student pilot's certificate. In the face of a record showing only that Ranger's information was that Culberson held a private pilot's certificate, the failure of Ranger to check the omitted exclusion cannot provide this court with the basis for an *assumption* "that Ranger fully intended to insure a student pilot." Quite the contrary is true, for if Culberson had held a private pilot certificate as Ranger thought he did, the student pilot exclusion would have been inapplicable.

The district court and circuit court majority, in effect, hold that if hindsight shows that a particular policy rider exclusion, available but not applicable, would also have excluded the risk in addition to the *"pilot clause" coverage conditions* then, as a matter of law, the court must *assume* that the risk was intended to be covered and refuse to apply the otherwise clearly applicable suspension of coverage principle. Such a holding is outrageous and clearly erroneous.

The insured, not the insurer, is in the best position to know what type FAA certificate he holds and what limitations or prohibitions are imposed upon his flight activities. And most important, the insured is in the best position to make certain his flight activities are confined to such as fall within the ambit of the risk covered by his aviation insurance policy. As Judge Dyer stated in his dissent (A. 37a):

> [I]f Culberson was going to fly in violation of his FAA certificate and thereby increase the risk for passengers covered, Ranger should have been made aware of it and given an op-

> portunity to decline the risk. In my view, Ranger was entitled to rely on the information furnished to it and the district court should not have ignored it.

Judge Dyer was absolutely correct when he stated in dissent: "the majority requires *no* compliance with the pilot certificate which expressly forbade Culberson from carrying passengers" (A. 34a). It is exactly that which causes the substantial adverse impact that the circuit court's decision will have upon the aviation insurance industry.

This Court should exercise its power of supervision to require the Fifth Circuit to adhere to its proper judicial function when disposing of insurance contracts.

Supreme Court Rule 19(1)(b) provides that this Court will consider grant of a writ of certiorari:

> Where a court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision.

It is a well-recognized principle that it is not the function of courts to write or rewrite insurance contracts they are called upon only to construe. Thus, whether or not the trial or appellate court considers a particular condition of a policy to be reasonable or unreasonable from an underwriting viewpoint is not a proper basis for contract construction. As the Fifth Circuit held in *Canal Insurance Co. v. Dougherty*, 247 F.2d 508, 512 (5th Cir. 1957):

> We start with the proposition that our function is not to write insurance contracts. We are not underwriters. We must apply them as written by the parties [citing cases], even though the result compelled by the plain words used

> may appear or be thought to appear to be unreasonable, unduly harsh, or stringent. We cannot ignore them. We cannot substitute others for them. So at the start we must ascertain whether the words used really have a doubt or create uncertainty which needs construction. If not, the words control.

Similarly, the Fifth Circuit held in *National Surety Corp. v. Western Fire & Indem. Co.*, 318 F.2d 379, 387 (5th Cir. 1963):

> A provision of a contract, which is clear and unambiguous and not subject to more than one interpretation, is *not open to construction*, even if giving effect to its literal terms will work a hardship on one of the parties. The rule has been applied to insurance contracts. [Citations omitted].

The district court in *Bequette*, upon which the Georgia Court of Appeals relied in *Farmers and Merchants Bank, supra*, held:

> A court cannot and should not do violence to the plain terms of a contract by artificially creating ambiguity where none exists. In situations in which reasonable interpretation favors the insurer, and any other would be strained and tenuous, no compulsion exists to torture or twist the language of the contract. An insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected.

The foregoing insurance contract judicial construction rules were specifically raised by Ranger before the circuit court.

As Judge Dyer recognized in his dissent (A. 34a): "The Pilot Clause" under the "Declarations" in the policy is-

sued by Ranger to Culberson means *exactly* what it says and says *exactly* wl. .t it means.

In repudiating long standing rules of contract law by relying on an unwarranted *assumption* to circumvent the *Erie* rule and find coverage despite the plain meaning of the "pilot clause" conditions and the uncontroverted evidence of the breach thereof, the circuit court has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision," Supreme Court Rule 19(1)(b), such that certiorari should be granted to reestablish the proper standard of judicial review of an unambiguous insurance contract.

Conclusion

A Federal court of appeals sitting as "only another court of the State" of Georgia has patently ignored Georgia law which is "four-square" on all points. The conflict and uncertainty thereby created require grant of this petition for writ of certiorari to correct clear error.

Respectfully submitted,

E. SMYTHE GAMBRELL
Of Counsel for Petitioner

Atlanta, Georgia
April 24, 1972

Appendix A

Opinions and Judgments of the District Court

United States District Court

Northern District of Georgia

Atlanta Division

Civil Action No. 12362

Ranger Insurance Company

versus

Mrs. Miriam G. Culberson

Order

This action involves a claim by Ranger Insurance Company (hereinafter referred to as "Ranger") upon a promissory note executed by W. A. Culberson, herein represented by his administratrix, Mrs. Miriam G. Culberson (hereinafter referred to as "Culberson"). Presently pending before the court are summary judgment motions by Ranger and Culberson thereby placing at issue the question of liability under the promissory note. For the following reasons, the court hereby grants defendant's motion for summary judgment, and denies plaintiff's motion for similar relief.

On November 3, 1967, Ranger paid to Michigan National Bank the sum of $10,097.12 in settlement of the breach of warranty coverage under a Ranger aircraft insurance policy issued to W. A. Culberson. In considera-

tion for said payment, Michigan National Bank assigned to Ranger a promissory note dated July 31, 1967, payable to Hill Aircraft and Leasing Corporation by W. A. Culberson which promissory note had been previously assigned to Michigan National Bank.

On the date that Mr. Culberson purchased the aircraft in question he obtained an aircraft insurance policy from Ranger to cover him for personal liability and any damages which might be sustained to his plane while he was in operation thereof. He then held a student pilot certificate issued by the F.A.A. which was valid until January 31, 1968.

On August 30, 1967, Mr. Culberson took off from East Point, Georgia, on a cross country flight for business reasons. He stopped at Morristown, New Jersey, where Bruce A. MacLean boarded the plane. After take-off from Morristown, and while Mr. Culberson was the pilot in command, the aircraft crashed in the vicinity of Oxford, New York, killing both occupants. Ranger paid $10,097.12 to the lien holder of the insured aircraft, Michigan National Bank, in exchange for the assignment of the promissory note and mortgage given by Mr. Culberson. Ranger in this action seeks to recover from Mr. Culberson's estate the money paid Michigan National Bank.

Plaintiff contends that the policy, as executed, precludes recovery by its insured because of W. A. Culberson's actions in operating the airplane with a passenger aboard. In support of this conclusion, plaintiff relies on the following policy provisions:

> Item 7. Pilot clause:
>
> Only the following pilot(s) will operate the aircraft while 'in flight' and while holding proper pilot

certificate(s) with appropriate ratings as required by the Federal Aviation Agency:

> *W. A. Culberson or any other private or commercial pilot having a minimum of 200 total logged hours, including at least 25 hours in retractable gear aircraft.* (italicized portions typewritten).

Exclusions

This policy does not apply:

1. ...

2. to any occurrence or to any loss or damage occurring while the aircraft is operated, while in flight, by other than the pilot or pilots set forth under Item 7 of the Declarations;

3. to any Insured:

   (a) who operates or permits the aircraft to be operated in any manner which requires a special permit or waiver from the Federal Aviation Agency, whether granted or not, unless this Policy is specifically endorsed to include such operation.

Plaintiff avers that inasmuch as W. A. Culberson was not certified to carry passengers and that his doing so was in violation of Section 61.73 of the Federal Aviation Agency Regulations, 14 C.F.R. §61.73, any insurance he may have had was suspended during the term of his flight with MacLean aboard.

It has been the long standing policy of the courts to interpret insurance coverage so as to effect the broad purpose for which it was designed. *Paddleford v. Fidelity & Casualty of New York*, 100 F.2d 606 (7th Cir. 1938), *cert. denied*, 306 U.S. 664 (1939). Therefore, in situations

such as that before the court, any doubt as to the coverage under the policy should be resolved in favor of according the insured the benefits of the policy. Ga. Code Ann. §20-704(5); *Boston Ins. Co.* v. *Gable,* 352 F.2d 368 (5th Cir. 1965), *cert. denied,* 389 U.S. 823.

Clearly under the provisions quoted above and under the cases construing same, W. A. Culberson was authorized to fly the airplane, and plaintiff's claim that his actions violated Exclusion Two will not stand. *cf., Lineas Aereas Colombianas Expresas* v. *Travelers Fire Ins. Co.,* 257 F.2d 150 (5th Cir. 1958); *Electron Machine Corp.* v. *American Mercury Ins. Co.,* 297 F.2d 212 (5th Cir. 1961) (both cases involved unauthorized pilots, but indicate the conclusions would have been contra had the pilot been among those permitted to fly the airplane under the policy).

A closer question exists as to Exclusion Three of the policy wherein a failure to obtain a special permit or a waiver from the F.A.A. will bar recovery under the policy. Plaintiff contends that the insured was required to obtain a waiver in order to fly passengers under the terms of his flying certificate, and that his failure to do so thereby invalidates his coverage during the pendency of his fatal flight. Defendant asserts that such a construction of the provision would invalidate insurance coverage in nearly every plane crash, since most, if not all, airplane mishaps are caused by some violation of F.A.A. regulations. Additionally, defendant argues that had plaintiff desired to exclude specifically the events herein involved, it had the power at hand to do so, namely by including among the further endorsements to the policy, Endorsement No. Four which reads in part:

> The following Exclusion is added the "Exclusions" of the Policy:
>
> 10. Under Coverage A, B, C, D, E, and G to any Insured who operates or permits the aircraft to be operated:
>
> (a) . . .
>
> (b) in violation of any regulation pertaining to pilot certificates.

Said provision was deliberately omitted when Ranger chose to make applicable Endorsements Number One and Two on the same page. Finally, defendant contends that Ranger knew and permitted W. A. Culberson to carry passengers because the coverage on the policy was expressly made to include liability to passengers. See, Item 4.D. under coverages.

The two most closely analogous cases to the one at bar reach opposite conclusions on the point in question, *i.e.* whether coverage is suspended because of violations of F.A.A. regulations. In *Underwriters at Lloyds of London* v. *Cordova Airlines, Inc.*, 282 F.2d 659 (9th Cir. 1960), the insured crashed while carrying a planeload of dynamite in violation of C.A.B. regulation, and despite the fact that a waiver could have been acquired upon request. The court therein held the policy coverage to have been suspended and relieved the insurance company from liability thereunder. On facts nearly identical to those considered herein, however, the court in *Firemen's Fund Ins. Co.* v. *McDaniel*, 187 F.Supp. 614 (N.D. Miss.), *aff'd* 289 F.2d 926 (5th Cir. 1961), held that the insured was authorized under the policy to fly the airplane, whether he had a certification or not. The court pointed to the fact that government regulation of aircraft liability insurance

is informal, and that it is possible to write insurance upon a person without regard to whether he is certified to carry passengers. In other words, a person may be insured as to activities which his certificate does not permit. Likewise, a company could place more stringent requirements on insured than does the government regulation. Consequently, the court finds that inasmuch as the insured could pilot the aircraft in flight, with or without passengers aboard, the coverage would be in effect, whether he was certified or rated as a pilot by the governmental board or not. *Id.*, at 618. This conclusion is equally applicable to the case at bar, and the court hereby adopts a similar holding.

The court is additionally swayed by the fact that Ranger intentionally omitted an available exclusion which would have foreclosed consideration of the instant case, and the fact that Ranger deliberately and expressly typed the prefix "In-" before the provision applicable to passenger coverage. A contrary holding would invalidate airplane liability coverage in a significant number of cases contrary to the intent of either party at the time of purchasing said insurance.

Consequently, the court hereby grants defendant's cross motion for summary judgment and, accordingly, denies plaintiff's summary judgment motion. Ranger is, therefore, liable under the terms of the policy, and, as such, may not recover from the estate of W. A. Culberson the amount heretofore paid the Michigan National Bank on the promissory note.

So ordered this the 4th day of December, 1970.

/s/Albert J. Henderson, Jr.
Judge, United States District Court
for the Northern District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RANGER INSURANCE COMPANY

versus

MRS. MIRIAM G. CULBERSON
CIVIL ACTION No. 12,362

CAROL BROWN MACLEAN, As Executrix

versus

MIRIAM G. CULBERSON, As Administratrix

versus

RANGER INSURANCE COMPANY
CIVIL ACTION No. 12,886

ORDER

Ranger Insurance Company (hereinafter sometimes referred to as "Ranger") moves the court to amend and modify its prior order, dated December 4, 1970, which granted the summary judgment motion of Mrs. Miriam G. Culberson and denied Ranger's motion for similar

relief. Ranger contends: (1) that the court misconstrued the "Pilot Clause" of the insurance policy, (2) that the deceased's failure to have an instrument rating remained unrebutted by Mrs. Culberson, and (3) that the court should enter a final judgment on the third-party complaint in Civil Action No. 12,886 pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Movant alleges that the court erroneously held W. A. Culberson to have been properly certified under the "Pilot Clause". The said clause reads as follows:

> Item 7. Pilot Clause
>
> Only the following pilot(s) will operate the aircraft while 'in flight' and while holding proper pilot certificate(s) with appropriate ratings as required by the Federal Aviation Agency:
>
> *W. A. Culberson or any other private or commercial pilot having a minimum of 200 total logged hours, including at least 25 hours in retractable gear aircraft.* (italicized portions typewritten).

The crux of movant's argument is that W. A. Culberson's valid student pilot certificate was in some way suspended during the pendency of his flight with Mr. MacLean aboard, and that thereby Mr. Culberson, at the time of the accident did not hold a "proper pilot certificate" as is required by the quoted clause above.

The cases of *Electron Machine Corp.* v. *American Mercury Ins. Co.*, 297 F. 2d 212 (5th Cir. 1961); and *Lineas Aereas Colombianas Expresas* v. *Travelers Fire Ins. Co.*, 257 F. 2d 150 (5th Cir. 1958), asserted by Ranger as supporting their conclusion, dealt with factual situations unlike that presently before the court, because the pilots

actually operating the aircraft therein was wholly unauthorized to fly *at any time* under the terms of the policy. Mr. Culberson, however, as the named insured was specifically designated as competent to pilot the aircraft in question. Therefore, if Mr. Culberson is to be considered as a pilot without a proper certificate, his existing and valid certificate must have been in "suspension" at the moment of loss.

On the "suspension" question, Ranger cites the cases of *National Insurance Underwriters* v. *Bequette*, 280 F. Supp. 842 (D. Alaska 1968); and *Roach* v. *Churchman*, ____ F. 2d ____, 11 Avi. 17,733 (9th Cir. 1970), as support for its position. The court notes the similarity of the clauses and facts before the district court in *Bequette*, *supra*, but refers movant to the exclusionary clause ("Item H of the Exclusions") quoted by the court as requiring the conclusion reached. It was the joinder of the "Pilot Clause" *and* the "Exclusionary Clause" that required the court to hold that there existed no ambiguity in the contract as written. The point made by Mrs. Culberson that had Ranger desired to exclude the conduct herein involved, the adoption of Exclusion 4 would have foreclosed further dispute in the matter. It is just such an exclusion before the court in *Bequette* ("Item H") that is omitted here, and thusly further substantiates the court's prior determination. *Grigsby* v. *Houston Fire & Cas. Ins. Co.*, 113 Ga. App. 572 (1966), similarly contains a definitive exclusionary clause.

Movant's reliance on *Roach*, *supra*, is equally misplaced. The court therein held that the insurance coverage was not in suspension at the time of the crash merely because the pilot had failed to practice night landings and take-offs within ninety days of the fatal flight, as

required by F.A.A. Regulations. The only statement in the case which lends support to the position of Ranger is,

> . . . While the pilot's act of carrying a passenger at night in apparent contravention of §61.47 may have been negligent or even intentional, it did not violate any express term of his pilot's certificate.

Id., at 17,735. Consequently, only by implication can the court determine that the Eighth Circuit Court of Appeals might have held the contrary if faced with a question such as the one here. The court finds this inadequate precedent for such a holding on the present facts.

An example of how Ranger might have drawn its policy so as to avoid doubt, is exhibited by the case of *Export Ins. Co.* v. *Mercantile National Bank of Hammond*, ____ F. Supp. ____, Civil Action No. 4692 (N. D. Ind. March 19, 1968) (also cited by movant). The comparable "Pilot's Clause" reads as follows:

> The insured warrants that the aircraft will be operated only by pilots possessing a valid and effective pilot certificate *and all flights will be within the limitations of the operating privilege of the pilot's certificate and rating.* (emphasis added)

The policy further provided that:

> This policy does not apply:
>
> V. To any operation of the aircraft, with the permission of the named insured, in violation of the operating privilege of the pilot's certificate and the rating.

Clearly, under these provisions, no reasonable argument can be made that a pilot operating his airplane in violation of his certificate would be excluded from insurance

coverage while such disability persists. Unfortunately for Ranger, the policy issued neither had the clarity of the above quotations nor the obvious intent as evidenced thereby. A reasonable construction of the entire policy in question simply fails to exclude the insured's apparent conduct.

The court refuses to create ambiguity where none exists. *Electron Machine Corp.* v. *American Mercury Ins. Co., supra.* An insurance policy is to be construed as reasonably understood by the insured. *Stevens Industries, Inc.* v. *Maryland Cas. Co.,* 391 F. 2d 411 (5th Cir. 1961). Movant had means at hand to exclude what it now contends was hereinbefore intended. Upon a reconsideration of the arguments presented, the court finds that in inasmuch as Mr. Culberson did possess a valid student certificate and in light of the fact that an insurer may cover flights in direct contravention of the express limitations found on said certificate, Ranger's failure to explicitly exclude such a contingency required that all doubts be resolved in favor of the insured. *Boston Ins. Co.* v. *Gable,* 352 F.2d 368 (5th Cir. 1965) *cert. denied,* 389 U. S. 823.

Ranger asserts in its second ground, that Mrs. Culberson's motion for summary judgment should be denied because movant has raised an issue as to the lack of "proper instrument flight rating". This contention is amply rebutted by the case cited by Ranger, *Roach* v. *Churchman, supra.* The court therein specifically held that a similar violation, in the absence of a particular exclusion, would not justify the declination of coverage. Further, the court notes that "ratings" are not given pilots with "Student Certificates", and, therefore, the failure of deceased to possess an "instrument flight rating" should not work to his detriment.

Finally, Ranger requests that final judgment be entered on the third-party complaint in Civil Action No. 12,886. Finding no objection thereto, the court hereby grants movant's request and directs the clerk to enter final judgment in accordance with this order.

In summary, the court having considered the renewed arguments of movant, hereby affirms its prior adjudication as consistent with the law as it now exists. Judgment shall hereby be entered on the third-party complaint in Civil Action No. 12,886.

So ordered this the 22nd day of January, 1971.

/s/ ALBERT J. HENDERSON, JR.
Judge
United States District Court for
the Northern District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 12,886

CAROL BROWN MACLEAN, As Executrix,

vs.

MIRIAM G. CULBERSON, As Administratrix,

vs.

RANGER INSURANCE COMPANY,

FINAL JUDGMENT PURSUANT TO RULE 54(B)

On order having been signed by Judge Albert J. Henderson, Jr., on January 22, 1971 and filed in the Clerk's Office on January 26, 1971 granting the Motion of Defendant-Third Party Plaintiff, Miriam G. Culberson, for summary judgment against Third Party Defendant Ranger Insurance Company, and the Court having granted Ranger's request for entry of final judgment pursuant to Rule 54(B) of the Federal Rules of Civil Procedure and thus having certified that there is no just reason for delay, and expressly directing entry of final judgment on said Third Party claim against Ranger Insurance Company, it is

ADJUDGED that (1) Ranger Insurance Company is liable to defendant Miriam G. Culberson for all sums that may be adjudged to be due by said defendant to plaintiff under and by virtue of plaintiff's claim in this civil action to the extent of the limits of the Ranger Insurance Company's policy in question; (2) said insurance policy was in full force and effect on the date of the alleged crash and covered the liability, if any, of defendant to plaintiff by virtue of plaintiff's claim herein; (3) defendant Ranger Insurance Company is liable and obligated under said policy to defend Miriam G. Culberson, as administratrix, against the claims made by the plaintiff herein and to pay to the policy limits any judgment that may be rendered herein against defendant in favor of plaintiff; and (4) the taxation of costs in this action shall await entry of final judgment on plaintiff's claim against defendant.

Dated: January 29, 1971.

CLAUDE L. GOZA
By: (Illegible)
Deputy Clerk, U. S. District Court
Northern District of Georgia

Approved and Ordered
filed of Record:

/s/ ALBERT J. HENDERSON
U. S. District Judge

Opinion of the Court of Appeals

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1515

RANGER INSURANCE COMPANY,
Plaintiff-Appellant,

versus

MRS. MIRIAM G. CULBERSON, *as Executrix of the Estate of W. A. Culberson,*
Defendant-Appellee,

CAROL BROWN MACLEAN, *as Executrix,*
Plaintiff-Appellee,

versus

MIRIAM G. CULBERSON, *as Administratrix,*
Defendant-Third Party Plaintiff-Appellee,

versus

RANGER INSURANCE COMPANY
Third Party Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Georgia

(December 28, 1971)

Before GEWIN, GOLDBERG AND DYER,
Circuit Judges.

GOLDBERG, Circuit Judge: The facts of these two consolidated cases, both the tragic and the technical, are not in dispute. An airplane crash in New York claimed the lives of two men, and we are asked to construe the insurance policy that allegedly covered one of them, the pilot. The district court, on cross-motions for summary judgment, held that the policy was in effect during the accident. We affirm.

W. A. Culberson, the insured and the pilot of the private airplane, styled a Cessna 210A, purchased his airplane and an insurance policy during the same day. These transactions and the delivery of the policy took place in the State of Georgia, where Mr. Culberson resided. At that time and at the time of the crash, Mr. Culberson held a valid student pilot's license. About a month after purchasing the airplane and insurance, Mr. Culberson flew from his home in East Point, Georgia, to Morristown, New Jersey, where he picked up B. A. MacLean as a passenger. It was on the next leg of the journey that the plane crashed near Oxford, New York, in a violent thunderstorm, killing both men.

Appellant Ranger Insurance Company, the insurer, paid $10,097.12 to an aircraft lienholder under a warranty endorsement in the policy, thereby becoming the assignee of a promissory note that had been secured by Culberson's mortgage to the aircraft seller. Ranger then sued Culberson's estate on the subrogated note to recover

its payment. Ranger argued that Culberson's coverage was suspended during the accident because of violations of the policy. Thereafter, the executrix of passenger MacLean sued Culberson's estate in federal court, asking $750,000 for wrongful death. Culberson's executrix filed a third-party complaint, against Ranger, seeking judgment that Ranger is bound to defend or to indemnify the Culberson estate under its policy. After the actions were consolidated by the district court, both Ranger and Mrs. Culberson, executrix of Culberson's estate, moved for summary judgment in both actions. F.R.Civ.Pro. 56(b). The district court granted Culberson's motions and denied those of Ranger. Ranger was held liable under the policy to defend and to indemnify the Culberson estate, and not entitled to recover its warranty payment. Ranger appeals.

Under Georgia conflicts law, it is the place of the delivery of the insurance contract that controls in the diversity suit, *Float-Away Door Co. v. Continental Casualty Co.*, 5 Cir. 1967, 372 F.2d 701, *cert. denied*, 1967, 389 U.S. 823, 88 S.Ct. 58, 19 L.Ed.2d 76; *Pink v. AAA Highway Express, Inc.*, 1941, 191 Ga. 502, 13 S.E.2d 337, *aff'd*, 1941, 314 U.S. 201, 62 S.Ct. 241, 86 L.Ed. 152; *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 1941, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477. In our case, the contract was made and delivered in Georgia to a Georgia resident, and we shall look to Georgia law. That law requires that policies be interpreted liberally and in favor of coverage. *Johnson v. Mutual Life Ins. Co.*, 1922, 154 Ga. 653, 115 S.E. 14. In addition, any lack of clarity or any ambiguity in the policy is considered the responsibility of the insurance company, for it is the company that drafts the policies and must be required to draft clearly. Ga. Code Ann. § 20-704; *Cherokee Life Ins. Co. v. Baker*, 1969, 119 Ga.

App. 579, 168 S.E.2d 171; *Boston Ins. Co. v. Gable,* 5 Cir. 1965, 352 F.2d 368, *cert. denied,* 389 U.S. 823; *Float-Away Door v. Continental Casualty, supra.* At the same time, this court has no intention of stretching for ambiguity when it is not there, and the plain meaning of the policy obviously controls. *Canal Ins. Co. v. Dougherty,* 5 Cir. 1957, 247 F.2d 508.

Both parties ask this court, as they asked the district court, to construe the language of an insurance policy. The policy is a standard one, mostly printed but with additional forms and riders typewritten or checked. All additional materials were prepared by Ranger on its own stationery. The policy before us is not a paradigm of clarity, and if there be ambiguities in the construction, the constructor must allow a green light to coverage in passing upon its words. If there be a red light, it, of course, will not be ignored; but even a yellow caution brings us much nearer the green one, calling for coverage. On appeal, Ranger asks us to conclude as a matter of law that the district judge was wrong in his assessment of this policy. On the contrary, we quite agree with the district judge's assessments of both policy and law.

That concluded, we pose our question for review as a matter of law: Was it the intention of the parties from the terms of the policy, as such terms would reasonably be understood by the insured, that Culberson would be covered under the circumstances that later occurred? Ga. Code Ann. § 20-702; *Stevens Industries, Inc. v. Maryland Casualty Co.,* 5 Cir. 1968, 391 F.2d 411, *cert. denied,* 392 U.S. 507, ____ S.Ct. ____, ____ L.Ed.2d ____; *Loftin v. U. S. Fire Ins. Co.,* 1962, 106 Ga. App. 287, 127 S.E.2d 53; *Royal Indemnity v. McClatchy,* 1960, 101 Ga. App. 507, 114 S.E.2d 394. We must look at the policy as a totality, using the usual rules of construction of contracts, Ga.

Code Ann. § 56-2419; *Float-Away Door Co. v. Continental Casualty Co., supra; Stevens Industries, Inc. v. Maryland Casualty Co., supra.*

On appeal, Ranger argues that Culberson's coverage was "suspended" during the alleged transgressions of the policy. This is in accord with the accepted principle of our court that a violation of an insurance provision does not operate to cancel a policy, but only to suspend its application to any accident that occurs during the violative acts. *Lineas Aereas Colombianas Expresas v. Travelers Fire Ins. Co.*, 5 Cir. 1958, 257 F.2d 150. Specifically, Ranger's "suspension" argument centers around the fact that Culberson carried a passenger, admittedly in violation of the FAA regulations, and contrary to a provision that was stamped on his student certificate. From that fact, Ranger contends that coverage was suspended by any one of three clauses in the policy.

I. THE PILOT CLAUSE

One of the provisions in Culberson's policy provided:

> "Only the following pilot(s) will operate the aircraft while 'in flight' and while holding proper pilot certificate(s) with appropriate ratings as required by the Federal Aviation Agency:
>
> > *W. A. Culberson or any other private or commercial pilot having a minimum of 200 total logged hours including at least 25 hours in retractable gear aircraft."*
>
> [The italicized portion was typewritten by Ranger; the rest was printed.]

Ranger's argument goes as follows: Culberson would be covered only "while holding a *proper* certificate . . . with *appropriate* ratings; because Culberson flew with a

passenger, his certificate was "improper" and his ratings "inappropriate."

Ranger begins its first argument under the Pilot Clause by contending that Culberson's certificate was not "proper" within the sanctions of the Pilot Clause because his carrying of a passenger violated the face of his student certificate. The certificate had the notation "Passenger Carrying Prohibited" stamped in two places. We cannot agree.

We do not read the word "proper" as requiring exact compliance with the face of the certificate. It is quite proper for an insurance company to insure a pilot for any permutation of circumstances, whether or not that permutation involves conduct that violates the certificate or the FAA regulations. *Fireman's Fund Ins. Co. v. McDaniel*, N.D. Miss. 1969, 187 F.Supp. 614, *aff'd*, 5 Cir. 1961, 289 F.2d 926. It is the policy, not the pilot's certificate nor the FAA regulations, that sets the perimeters of insurance coverage.

In viewing the totality of the policy, we observe that omitted form paragraphs are parts of a written document. They serve to explain the intent of the parties, just as typewritten or handwritten statements serve to clarify or to change the sense of printed paragraphs. *See Royal Indemnity v. John F. Cawrse Lumber Co.*, D. Ore., 1965, 245 F.Supp. 707; *Aetna Life and Casualty Co. v. Charles S. Martin Distributing Co.*, 1969, 120 Ga. App. 133, 169 S.E.2d 695; *Fireman's Fund v. McDaniel*, *supra*. Ranger included an additional page of printed exclusions in Culberson's policy. The page had four exclusions, with boxes to the side that Ranger was to check if applicable to the policy. Of the four exclusions printed on the page, only two were checked by Ranger as applying to Culberson.

Those two checked exclusions are not relevant here. One omitted exclusion read:

> "It is agreed that this policy does not apply and no coverage is afforded to any insured while any aircraft insured under this policy is being operated by a Student Pilot unless said Student Pilot is under the direct supervision of a properly qualified FAA Certified Flight Instructor who shall have specifically approved each flight undertaken by the student prior to take-off. This exclusion shall not apply to any Student Pilot after he has received his Private Pilot Certificate."

By failing to check that provision, we must assume that Ranger fully intended to insure a student pilot.[1]

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[1]Culberson dealt directly only with the Guy Hill Insurance Agency, Ranger's agent. Under Georgia law the insurer is estopped to deny any misconduct or negligence by its agents, and the company is deemed to have construcitve knowledge of any facts of which the agent has actual knowledge. *Stillson v. Prudential Ins. Co.*, 1947, 202 Ga. 79, 42 S.E.2d 121; *Reserve Life Ins. Co. v. Ayers*, 1961, 217 Ga. 206, 121 S.E.2d 649; *National Life & Accident Ins. Co. v. Goolsby*, 1955, 91 Ga. App. 361, 85 S.E.2d 611; *Barber v. All American Assurance Co. of Louisiana*, 1953, 89 Ga.App. 270, 79 S.E.2d 48. In addition, the burden under Georgia law is on the insurer to prove any facts regarding misrepresentation or fraud. *Reserve Life Ins. Co. v. Ayers, supra; Lamb v. Empire Life Ins. Co.*, 1954, 143 Ga. 180, 84 S.E. 439; *O'Connell v. Supreme Conclave Knights of Damon*, 1943, 102 Ga. 143, S.E. 282. At no point in the record is there any evidence whatsoever that Culberson was less than candid in his representations to Guy Hill. Culberson's application to Ranger for insurance was signed *only* by Guy Hill, not by Culberson himself, and we have no indication in the record that Culberson even saw that document. *Compare Jessup v. Franklin Life Ins. Co.*, 1968, 117 Ga. App. 389, 160 S.E.2d 612; *State Farm Mutual Automobile Ins. Co. v. Anderson*, 1963, 107 Ga. App. 348, 130 S.E.2d 144.

In the answer to an interrogatory and in an affidavit submitted by the vice-president of its underwriters, Ranger asserts that it did not have actual knowledge that Culberson was only a student pilot. This assertion, of course, does not answer in any way any of the factual or legal questions raised by the transaction that took place between Culberson and Guy Hill. Under the circumstances of this case, with the exception of actual misrepresentation by Culberson, Ranger is charged with knowledge of whatever took place in Guy Hill's office, even if what took place was that, through the negligence of the agent, nothing at all was said regarding the status of Culberson's license. Without Culberson's signature on the application to Ranger, the court below could only conclude that the information on the application came about through the negligence of the agent, the misconduct of the agent, or the misrepresentations of Culberson.

On appeal and in its brief in support of its motion for summary judgment below, Ranger raised the inference that Culberson had misrepresented his level of flying expertise. This will not do. There is simply no scrap of direct evidence in the record that Culberson misrepresented himself to *Guy Hill*, which is the crucial question regarding insurance information. Moreover, any alleged fraud or misrepresentation between Culberson and Guy Hill must be raised in the pleadings, not by inference. If not so raised, the defense is waived. Fed. Rules Civ. Pro. 8(c); *Systems Inc. v. Bridge Electronics Co.*, 3 Cir. 1964, 335 F.2d 465. Ranger did not raise in the district court any question or misrepresentation by Culberson to Guy Hill, a question clearly within Ranger's scope of information, and, therefore, the question of misrepresentation is not properly before us. In fact, we do not find in Ranger's evidence in support of its own motion for summary judgment any statement that Culberson was guilty of misrepresentation or fraud. In this case, Ranger, upon entering the arena erected for deciding cases on summary judgment, must abide its Marquis of Queensberry Rule which requires that a party submit facts, not hypotheses, of fraud or misrepresentation before it is entitled to summary judgment.

Ranger's defense in the court below, as demonstrated by its pleadings, its affidavit in support of its own motion for summary judgment, Culberson's application for insurance, and its

Ranger not only omitted the exclusion that specifically forbade coverage to student pilots, but also omitted an exclusion that read as follows:

> "The following Exclusion is added to the Exclusions of the Policy: . . . to any Insured who operates or permits the aircraft to be operated . . . *in violation of any regulation pertaining to pilot certificates.*" [Emphasis added.]

Ranger's failure to check that exclusion is of some consequence in its argument that an infringement of the pilot certificate is an "impropriety" that negates coverage under the Pilot Clause. This omission is even more significant in light of the one extant Georgia case on the question of Pilot Clauses and non-compliance with the pilot certificate. In *Grigsby v. Houston Fire and Casualty Co.*, 1966, 113 Ga. App. 572, 148 S.E.2d 965, the court held that the pilot's failure to complete the required number of practice take-offs and landings and his failure to obtain a current medical certification violated the terms of his pilot's certificate, and therefore suspended coverage. However, the insurance policy in *Grigsby* contained an exclusion specifically providing that there should be no coverage when the aircraft was operated "in violation of any regulations pertaining to Airman's Certificates." The exclusion that Ranger chose to omit in Culberson's policy suspended coverage whenever there were operations "in violation of any regulation pertaining to pilot certificates." While not precisely the same, the language and,

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entire argument on appeal is addressed to policy construction; Ranger does not seek a remand for a trial. Without the misrepresentation issue Ranger must rely only on the written insurance policy to claim lack of coverage, construed under the presumption that Ranger, through its agent, fully intended that the policy read precisely as it was made out to Culberson.

we think, the intent of the two passages are close enough to lend weight to our concern with Ranger's omission. Ranger, through an affidavit from the vice-president of its aviation managers, argues that the omitted exclusion was intended to be applicable only to "flying clubs." True or not, that is not quite relevant to our inquiry here. We wish to know what Culberson's reasonable expectation was when he read that exclusion page, saw two items checked as applicable, and saw the "pilot certificate" exclusion left unchecked as inapplicable. We feel that the words compel only one reasonable meaning, and that is that the omitted provision is intended to apply to whoever is insured. Without further explanation in the policy, Ranger cannot at this date stamp an "only applicable to flying clubs" into the policy.

In sum, if Ranger wished to suspend coverage in the event of any violation of Culberson's pilot's certificate, then it should have specifically said so in the policy. We do not read that specificity into the word "proper" in Ranger's behalf, and we find support for our decision in the fact that Ranger itself chose not to include easily-available form language that would have readily provided the necessary specificity.

The case of *Roach v. Coachman,* 8 Cir. 1970, 431 F.2d 849, does not support Ranger on this point. There is one statement by the Eighth Circuit regarding violation of a pilot's certificate, but the context of that statement makes it quite inapposite here. The policy provision in *Roach* specifically stated that a violation of the certificate would suspend coverage, a stipulation very much akin to the *Grigsby* provision and to Ranger's *omitted* exclusion. We might also note that the holding of *Roach* was that a violation of certain sections of the FAA regulations would *not* operate to suspend coverage under two separate ex-

clusions, one that suspended coverage in case of violation of the pilot certificate and another that suspended coverage in case of "unlawful purpose." We find the rationale of that holding quite in concert with our decision here.

Secondly, with respect to the Pilot Clause, Ranger insists that Culberson's admitted violation of the Federal Aviation Regulations in carrying a passenger operated to make his certificate "improper." 14 C.F.R. § 61.3(a). Again, we cannot agree. We would assume that an "effective" certificate is a "proper" one, however one might wish to muddle those words about. The FAA regulations provide specifically that any pilot certificate (including a student certificate) ceases to be "effective" only if it is "surrendered, suspended, or revoked." 14 C.F.R. § 61.9. None of the three "ifs" attached to Culberson's certificate. The student certificate provides on its face only that the certificate *might* be revoked by the carrying of a passenger in violation of the regulations.[2] Thus the fact that Culberson carried a passenger did not, *ipso facto,* revoke or suspend his certificate. *See United States v. Eagle Star Ins. Co.,* 9 Cir. 1952, 196 F.2d 317, *rev'd on other grounds on reh.,* 1963, 201 F.2d 764. Mr. Culberson held a perfectly "proper" certificate at the time of his accident, even though his conduct was regulated by the FAA, and the certificate remained "proper" until it was suspended or revoked by discretionary act of the FAA. *See Hall's Aero Spraying, Inc. v. Underwriters at Lloyd's of London,* 5 Cir. 1960, 274 F.2d 527; *see also Roach v. Coachman, supra.*

If Ranger wishes us to read the general term "proper"

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[2]"A violation of this limitation *may* result in the REVOCATION FOR ONE YEAR of this certificate or any pilot certificate subsequently issued." [Emphasis added]

as requiring that *any* transgression of an FAA regulation should operate as an "impropriety" of sufficient intent to suspend coverage, then our declining to read a general word so broadly should come as no surprise, for we have declined to do so before. *Hall's Aero Spraying v. Lloyd's of London, supra; accord, Roach v. Coachman, supra.*[3] Words of exclusion in insurance policies should be given small tolerance when insurance companies choose to use words of imprecision. Indeed, the logic of Ranger's argument for exclusion would be to engraft as exceptions to coverage the violation of every proscribed peccadillo of FAA regulations. The cases cited by Ranger in its support go to the heart of coverage, and it cannot be that every impaired capillary blocks coverage. Almost all airplane accidents involve some violation of the Federal Aviation Regulations. Even "careless flying," or simply negligence, is a violation. *See* 14 C.F.R. § 91.9. The *Roach* case construed a similar argument:

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[3]Ranger's asserted construction might also be contrary to Georgia policy:

> "No policy of insurance issued or delivered in this state covering any loss, expense, or liability arising out of the ownership, maintenance, or use of an aircraft shall exclude or deny coverage because the aircraft is operated in violation of civil air regulations pursuant to Federal, State or local laws or ordinances. This section does not prohibit the use of *specific* exclusions or conditions in any such policy which relates to any of the following:
>
> (a) Certification of an aircraft in a stated category by the Federal Aviation Administration.
>
> (b) Certification of a pilot in a stated category by the Federal Aviation Administration.
>
> (c) Establishing requirements for pilot experience.
>
> (d) Establishing limitations on the use of the aircraft."

Ga. Code Ann. § 56-2439. [Emphasis added]

> "Applying this analysis, the insuring agreements become illusory in effect since few accidents occur without the aircraft's owner or pilot violating one or more of the very detailed regulations promulgated by the Federal Aviation Administration."

431 F.2d at 853.

To read into the general word "proper" all violations of the regulations would be to hoodwink most insurance purchasers, for it would make a nullity of most coverage. Purchasers believe, and with good reason, that they have bought insurance to protect themselves from precisely those degrees of negligence or outright carelessness that FAA regulations might condemn. Insurance is procured to protect the violator, and every violation cannot nullify coverage. Any intent to use general words as a blunderbuss and every single regulation as birdshot cannot be reasonably upheld. If an insurance company has an intent to deny coverage in a specific set of circumstances, then it should so delineate. *See Moulor v. American Life Ins. Co.*, 1884, 111 U.S. 335, 4 S.Ct. 466, 28 L.Ed. 447.

Ranger's third and final argument with regard to the pilot clause is that the coverage should be suspended because Culberson did not have a "proper instrument flight rating." In the *Roach* case, *supra,* the Eighth Circuit was faced with a similar argument concerning a full-fledged pilot who did not have proper "instrument flight rating" because he did not complete the required number of practice flights before flying at night. We have a student pilot. The pilot clause of *Roach* specifically allowed for suspension of coverage during acts in violation of the pilot certificate. Our pilot clause does not. Yet even under the former circumstances, the *Roach* court held

that a general term in the pilot clause could not be interpreted to suspend coverage during any and all violations of the Federal Aviation Regulation. We took a similar approach in *Hall's Aero Spraying, supra,* on which the Eighth Circuit relied in *Roach.*

But we find another element controlling the "appropriate rating" issue in our case." "Ratings" of any sort are not given to student pilots, according to the regulations that we are asked to apply. 14 C.F.R. § 61.16(d)(1) and § 61.16(b). It was therefore quite impossible for Culberson, at any time, to receive an "instrument flight rating" or any other rating. And we are now asked to conclude that this fact suspended insurance coverage. Actually, what Ranger asks us to do is to invalidate the insurance policy. If the absence of flight ratings is an "inappropriate" rating within the ambit of the pilot clause, then, with no possibility of flight ratings of any sort, Culberson would be flying in constant violation of his policy; whatever he did would have an "inappropriate" rating. We refuse to hold that Culberson contracted to pay a premium of $553 per year for a policy that was "suspended" *ab initio.* When Ranger agreed to insure a student pilot, it was charged with the knowledge that he could not obtain any flight ratings whatsoever while he held that type license. Ranger is estopped from trying to raise "appropriate ratings" from the dead at this point.

The case of *Lineas v. Travelers Fire Insurance, supra,* cited by Ranger in its brief with regard to the pilot clause, is quite inapposite. In *Lineas,* a diversity action controlled by Florida law, the company insured an airplane for cargo purposes. The pilot clause of that policy provided that the airplane should be flown only by those regular pilots of the insured who held licenses issued by United States or Colombian authorities. The insured

made his airplane available to a co-adventurer for flights within the borders of Mexico, knowing that under Mexican law the craft would have to be registered as a Mexican airplane and would have to be piloted by Mexican pilots. The airplane crashed in Mexico, with Mexican pilots at the controls, while it was carrying passengers and no cargo. The incidents of *Lineas* operated to change fundamentally the matrix of the risks that the company had agreed to insure. The Mexican pilots who were in command when the airplane crashed were entirely outside the whole species of pilots specified in the pilot clause. In our case the pilot flying the airplane was well within the clause, specifically named in fact. The Mexican pilots of *Lineas* were not authorized to fly the plane at any time. Culberson was clearly authorized to fly the airplane. And, as we have discussed above, the pilot clause did not operate to forbid the carrying of passengers. Whether other provisions of the policy would suspend coverage in the event of passenger carriage remains to be explained. We refer now only to the pilot clauses of our case and of *Lineas*. We might add, however, that the ill-fated flight of *Lineas* involved a purpose entirely without the very specific purpose for which the insurance company had contracted, the carrying of cargo. In our case Culberson's flight was entirely within the purposes that Ranger agreed to cover.[4] Therefore, we find *Lineas* inapplicable to our policy and our set of facts.

[4]The policy in *Lineas* did have a provision that excluded coverage in the event that the flight's purpose were one that required a special FAA permit (unless that purpose were endorsed by the company on the policy), or in the event that the flight were for an "unlawful" purpose. The former proviso is similar to Ranger's Exclusion Three, but the *Lineas* court did not construe that proviso. It rested its decision on the pilot clause and on the overall intent of the parties. See also Electron Machine v. American Mercury Ins. Co., 5 Cir. 1961, 297 F.2d 212.

II. EXCLUSION TWO

The second provision of the policy on which Ranger bases this appeal reads as follows:

> "This policy does not apply . . . to any occurrence or to any loss or damage occurring while the aircraft is operated while in flight, by other than the pilot or pilots set forth under Item 7 of the Declarations [the Pilot Clause]."

Ranger argues that the accident occurred when the airplane was operated by "other than the pilot set forth" under the Pilot Clause, thereby suspending the coverage during such activity. However, if the pilot clause and attendant facts cannot suspend coverage, then we find it quite impossible to conclude that Item Two of the printed exclusions works the suspension that Ranger seeks.

It is uncontroverted that Culberson flew the airplane, and that Culberson is specifically named in the typed portion of the Pilot Clause. Exclusion Two does not incorporate by its terms all of the Pilot Clause; it refers only to those pilot(s) "set forth" in the clause. Exclusion Two specifically omits any reference to or incorporation of the printed part of the Pilot Clause, which is the part of the clause that included the phrase "while holding a proper pilot certificate . . . with appropriate ratings as required by the Federal Aviation Agency." It was that printed phrase that drew our attention in our discussion of the entire Pilot Clause above. Without reference to "propriety" or "appropriateness," Exclusion Two simply requires that the airplane be operated only by the "pilot . . . set forth under Item 7 of the Declarations [the Pilot Clause]." It is our conclusion that the exclusion does not apply to these facts. The airplane was at all times operated by Culberson, the specifically named pilot of the

referent Pilot Clause. Under similar circumstances, we have held that a pilot specifically named is clearly covered, even if flying in violation of the regulations. *Fireman's Fund v. McDaniel, supra.* In fact, our understanding of Exclusion Two brings our case almost four-square with *McDaniel.* In *McDaniel,* as here, the name of the pilot was specifically typed into the clause, along with an "other pilots" phrase similar to that in the Ranger policy. As here, the student pilot in *McDaniel* carried a passenger when he crashed. In spite of the fact that the company in *McDaniel* had included almost precisely the same two exclusions that Ranger omitted here, the district court held that the specifically-named student pilot had been insured to fly the aircraft for *any* purpose. We affirmed that part of the holding. Without further provision by Ranger, *McDaniel* controls on the issue of Ranger's Exclusion Two, and that exclusion does not bar coverage to the named insured under these circumstances.

III. EXCLUSION THREE

The final policy provision that Ranger contends suspended Culberson's insurance coverage provides:

> "This policy does not apply . . . to any insured . . . who operates or permits the aircraft to be operated in any manner which requires a special permit or waiver from the Federal Aviation Agency, whether granted or not, unless this Policy is specifically endorsed to include such operation."

Ranger argues that Culberson violated a regulation by carrying a passenger [14 C.F.R. § 61.3(a)], that he did not obtain a waiver from the FAA for the act of carrying a passenger [49 U.S.C.A. § 1421], and that Ranger did not endorse the carrying of a passenger.

We conclude that Exclusion Three does not apply to suspend coverage in this instance. Even if applicable to Mr. Culberson under *McDaniel,* the terms of Exclusion Three were met. The policy did not require a waiver by the FAA; it required only an endorsement of "such operation" by the company. We have already concluded that Ranger is to be charged with knowledge that Culberson, at his application as well as at his death, was a student pilot and no more. We then note that passenger coverage is specifically "*in*"-cluded in the policy, the "in" having been typed into a blank space in the policy, in capital letters, by Ranger. For that "in,", Culberson paid an additional premium of $175 per year, almost 50% more than the premium without the passenger coverage. Ranger argues that the passenger proviso relates only to the "other pilots" that are mentioned in the typed portion of the Pilot Clause and not to Culberson himself. We find this quite an improbable construction. There is certainly nothing in the provision itself to indicate that the "in"-clusion goes to one part of a conjoined sentence and not to the other. Moreover, the fact that Culberson's name is specifically typed into the clause indicates to us that the passenger proviso, which falls on the same page and in close proximity of the Pilot Clause, was fully intended to apply to Culberson. This is another one of those occasions in which a construction seems compelled by the words. If Ranger intended to convey something less by checking this proviso and charging the additional premium, then that should have been clearly stated. By "in"-cluding the passenger coverage provision, Ranger specifically endorsed his "operation" of the aircraft with a passenger aboard for the purposes of Exclusion Three.

In a sense broader than the three clauses we have discussed above, we feel that Ranger contracted for pre-

cisely the matrix of risks that eventualy came to fruition. *Compare Underwriters at Lloyd's of London v. Cordova,* 9 Cir. 1960, 283 F.2d 659. Ranger insured a student pilot and "in"-cluded passenger coverage, omitting specific exclusions that might have foreclosed the entire issue.

The clumps of words in an insurance policy might seem like so much insignificant jabberwocky to those who follow insurance law, perhaps worse to those who only stumble into the field. Jabberwocky it might be. Insignificant it is not. On those clumps of words rests the intent of the insurance coverage. Some insurance policies, their riders, exclusions, folds-in and folds-out, and appendages, are festooned in such ways that mechanical knowledge is a help in unfolding and laying them out so that the policies are in physically readable form. An insured, who is presented with forms and discussion in widely varying degrees of clarity, is entitled to know the precise nature of the insurance coverage that his premiums are buying. It is all too clear that contract language, while at times a great explainer, is at times a great obscurer. It is incumbent upon insurance companies to state clearly the perimeters of their coverage to those who entrust their security to them. Partly in the hope that that clarity might eventually come to pass, this case is affirmed.

AFFIRMED

DYER, Circuit Judge, dissenting:

I respectfully dissent. The crucial issue in this appeal is whether "The Pilot Clause" under the "Declarations" in the policy issued by Ranger to Culbersons means *exactly* what it says and says *exactly* what it means. The The pilot's clause provides:

> "Only the following pilot(s) will operate the aircraft while 'in flight' and while holding proper pilot certificate(s) with appropriate ratings as required by the Federal Aviation Agency:
>
> *W. A. Culberson or any other private or commercial pilot having a minimum of 200 total logged hours including at least 25 hours in retractable gear aircraft."*
>
> [The italicized portion was typewritten by Ranger; the balance was printed.]

The majority opinion introduces the unsupportable assumption "that Ranger fully intended to insure a student pilot." It then charges Ranger "with knowledge that Culberson, at his application as well as at his death, was a student pilot and no more." Finally, it flatly states that "Ranger insured a student pilot . . ." Upon this premise then the majority "does not read the word 'proper' as requiring exact compliance with the face of the [pilot's] certificate." In fact, the majority requires *no* compliance with the pilot certificate which expressly forbade Culberson from carrying passengers. There is not one iota of evidence in the record to support the majority's assumption, charge or conclusion that Ranger knew that Culberson was a student pilot. On the contrary, the only information that Ranger had was that Culberson held a private pilot's license.

The district court decided this case on cross motions for summary judgment. Before the court was the follow-

ing: Ranger's answer to an interrogatory that the policy was based on an application which stated that Culberson, the named insured, was a private pilot, and the application submitted by an insurance agent which contained the name and address of Culberson and detailed information that was copied directly into the "Declarations" of the policy, i.e., the policy period from August 1, 1967 to August 1, 1968, that the aircraft would be tied out at Fulton County Airport, the specific coverages and premium charges, a description of the aircraft, the purposes of use, and a loss payable clause to the mortgagee, Michigan National Bank, in the amount of $10,100. The application further contained pilot information showing that Culberson held a private pilot's certificate with a single engine rating with a total of 100 logged hours, 15 in retractable gear aircraft, and described other pilots who could operate the insured aircraft with a private license and 200 total logged hours, 25 in retractable gear. There was also the uncontradicted affidavit of Parks, Senior Vice President of the aviation managers of Ranger, in which he stated that "Ranger Insurance Company had no knowledge that Mr. Culberson had only a student pilot license, as it had been represented to the company that he held a private pilot license with a single engine rating." The district court also had before it the policy with the pilot clause limitations which tracked the information in the application, and a certified copy of Culberson's Student Pilot Certificate issued January 21, 1966, on which was marked in two places, "PASSENGER CARRYING PROHIBITED."

I would have no hesitancy in joining with the majority had Ranger issued the policy as written with knowledge that Culberson was a student pilot. The insurer may knowingly undertake a risk although it involves pilot

conduct that violates his certificate or FAA regulations. And an insurer may be bound if the typewritten portion of the pilot's clause names the insured "as a person authorized to operate this aircraft in flight, without regard to his certification or rating as a pilot" even though the insured is a student pilot. *Firemen's Fund Insurance Company v. McDaniel*, N.D. Miss. 1960, 187 F. Supp. 614, *aff'd* 5 Cir. 1961, 289 F.2d 926. But this is, of course, not this case. Furthermore, the form, omitted as inapplicable, excluding coverage when the aircraft was being operated by a student pilot not under the direct supervision of a FAA flight instructor, would, as the majority suggests, be of considerable moment to explain the intent of the parties, but only if Ranger was aware of Culberson's student pilot certificate. If Ranger knew this, then the omission of the exclusion would have been compelling evidence of Ranger's intent to insure Culberson, notwithstanding he held only a student pilot certificate.

It bears repeating that Ranger did not know and was not charged with any knowledge that Culberson held a student pilot's certficate. In the face of a record showing only that Ranger's information was that Culberson held a private pilot's certificate, the failure of Ranger to check the omitted exclusion cannot provide this court with the basis for an *assumption* "that Ranger fully intended to insure a student pilot." Quite the contrary is true, for if Culberson had held a private pilot certificate as Ranger thought he did, the student pilot exclusion would have been inapplicable.

The majority seems to take the position that the information furnished Ranger that Culberson was a private pilot cannot be considered because Ranger did not plead fraud and misrepresentation, nor was this issue considered by the court below. As we have shown, the applica-

tion for insurance, the uncontradicted affidavit, and the answer to interrogatory were before the district court in support of Ranger's motion for summary judgment. They were not submitted for the purpose of showing fraud but for the evidentiary purpose of showing that the policy was written in conformity with the information Ranger possessed. This makes F.R.Civ.P. 8(c) inapposite. The crucial issue of whether this information was properly raised in the district court and hence properly before us cannot be glossed over in a footnote as the majority attempts to do. If Culberson had held a private pilot's certificate, as was Ranger's information, "Liability Including Passengers" would have been an appropriate coverage; Exclusion No. 3 covering student pilots, would have been inapplicable and the words "with appropriate ratings" in the pilot clause would have had significance, in contrast to the fact that "ratings" of any sort are not given to student pilots.[1] But if Culberson was going to fly in violation of his FAA certificate and thereby increase the risk for passengers covered, Ranger should have been made aware of it and given an opportunity to decline the risk. In my view, Ranger was entitled to rely on the information furnished to it and the district court should not have ignored it.

But assuming *arguendo* that Ranger had no information concerning what type of certificate Culberson held, it was, of course, entitled to limit the coverage of the policy in any manner it deserved. The limitations of coverage in the policy are perfectly clear and Culberson was bound by them. He knew that his student pilot certificate prohibited him from carrying passengers any time, any where. He knew that the "Including Passengers" provi-

[1]It is noteworthy that the application also referred to Culberson as having a single engine rating.

sion would only be applicable when either a private or commercial pilot certificate holder, as specified in his policy, was flying the aircraft with passengers. He knew that his policy required him to have a proper pilot certificate. This could only mean that he was within the policy coverage if he flew the aircraft alone and that there would be no coverage while passengers were aboard.

Equating the word *proper*, as used in the insurance policy, with the word *effective*, which is not used in the policy, is, I deferentially suggest, an unwarranted exercise in semantics by the majority. We have repeatedly stated that

> * * * our function is not to write insurance contracts. We are not underwriters. We must apply them as written by the parties * * * even though the result compelled by the plain words used may appear or be thought to appear to be unreasonable, unduly harsh, or stringent. We cannot ignore them. We cannot substitute others for them.

Canal Insurance Company v. Dougherty, 5 Cir. 1957, 247 F.2d 508, 512. Of course, Culberson's student pilot certificate was effective until it was suspended, surrendered or revoked, but it was, nonetheless, an improper certificate when used by a student pilot to carry passengers. That the FAA did not revoke Culberson's certificate after his death seems wholly immaterial. Neither *Halls' Aero Spraying, Inc. v. Underwriters at Lloyds London*, 5 Cir. 1960, 274 F.2d 527, nor *Roach v. Churchman*, 8 Cir. 1970, 431 F.2d 849, are to the contrary. In *Hall's* the aircraft crashed while crop dusting without a state permit. This activity was not within the exclusion prohibiting the operation of an aircraft "for any unlawful purpose." In

Roach the court found that "the pilot's act * * * did not violate any *express* term of his pilot's certificate." (Emphasis added).

We are not concerned, as the majority suggests, with an attempt to "hoodwink" the insurance purchaser by nullifying coverage for simple negligence, careless flying or some other violation of the regulations. The word "proper" refers solely to and modifies "pilot certificate" and clearly has nothing to do with avoiding liability for tortious conduct.

Whether we accept the fact that Ranger was informed that Culberson held a private pilot's certificate, or whether Ranger was without knowledge that Culberson held only a student's pilot certificate, the policy as written and accepted by Culberson insured him while he was flying the aircraft without passengers (even though the issuer might not have agreed to this coverage had it known that it was insuring a student pilot, *McDaniel, supra*); but coverage was suspended during the time that Culberson was operating the aircraft with a passenger because this was expressly prohibited in his certificate. *Lineas Aereas Columbiana Expresas v. Travelers Fire Ins. Co.*, 5 Cir. 1958, 257 F.2d 150. In *Lineas* Judge Brown made it clear that "underwriting is the business of estimating risks." In doing so may not an insurer have properly taken into account that a student pilot is less qualified than one who has obtained a private pilot's certificate; that one holding a private pilot's certificate is authorized to carry passengers while a student pilot is forbidden to do so; and finally that covering a pilot in flight while he was doing what was expressly forbidden by his certificate would expose the insurers to almost incalculable risks?

> It is just such considerations that have led to the development of the principle * * * of suspension of coverage. It is, of course, true that development of the law along these lines has come from the desire to avoid an outright forfeiture. Consequently coverage is not permanently destroyed. It is suspended as long as, but only so long as, the violations of the specified basic policy requirements continue. Equally clear, coverage is revived the moment the breaches or conditions cease. But until that time there is no insurance for while the proscribed activity continues, the insurance is suspended as if it had never been in force. Travelers Protective Association of America v. Prinscen, 291 U.S. 576, 582, 54 S.Ct. 502, 504, 78 L.Ed. 999, 1003.

Lineas, supra at 155. *See also Electron Machine Corp. v. American Mercury Insurance Co.* 5 Cir. 1961, 297 F.2d 212.

The factual distinction that the majority makes between *Lineas* and the case *sub judice, i.e.,* that in *Lineas* the Mexican pilots were entirely outside those specified in the pilot's clause, while here Culberson was authorized to fly the aircraft, continues to disregard the fact that from the time a passenger came aboard Culberson was also entirely outside the specie of pilot specified in the pilot's clause.

In this diversity case, as the majority points out, Georgia law is controlling. In *Grigsby v. Houston Fire & Casualty Ins. Co.*, Ga. App. 1966, 148 S.E. 2d 925, the Georgia Court of Appeals cited Lineas with approval and held that a pilot clause almost identical to the one in issue here was "a valid and binding one." Although there was no coverage due to a violation of a regulation pertaining to pilot certificates under an exclusionary

clause in *Grigsby*, the court also relied upon the conditions of the pilot clause. Obviously, the court would not have discussed the pilot clause except for the fact that its violation also suspended coverage.

The district court and the majority seem unwilling to give effect to the sound precedent established by this court that:

> The hazards against which a company is to insure are usually in the category of its business and the courts will not undertake to review its judgment or to hold it to the coverage of risks which it has expressly excluded.

Electron, supra at 214.

I would reverse the judgment of the district court with directions to enter judgment in favor of Ranger.

Order of Court of Appeals Denying Rehearing

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1515

RANGER INSURANCE COMPANY,
Plaintiff-Appellant,

versus

MRS. MIRIAM G. CULBERSON, *as Executrix of the Estate of W. A. Culberson,*
Defendant-Appellee,

CAROL BROWN MACLEAN, *as Executrix,*
Plaintiff-Appellee,

versus

MIRIAM G. CULBERSON, *as Administratrix,*
Defendant-Third Party Plaintiff-Appellee,

versus

RANGER INSURANCE COMPANY
Third Party Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Dec. 28, 1971, 5 Cir., 1971, ____ F.2d ____).

(January 26, 1972)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

DYER, Circuit Judge, dissenting:

For the reasons heretofore stated, I dissent from the denial of the petition for rehearing.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1971

No. 71-1515

D. C. DOCKET NOS. 12362 & 12886

RANGER INSURANCE COMPANY,
Plaintiff-Appellant,

versus

MRS. MIRIAM G. CULBERSON, *as Executrix of the Estate of W. A. Culberson,*
Defendant-Appellee,

CAROL BROWN MACLEAN, *as Executrix,*
Plaintiff-Appellee,

versus

MIRIAM G. CULBERSON, *as Administratrix,*
Defendant-Third Party Plaintiff-Appellee,

versus

RANGER INSURANCE COMPANY
Third Party Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Georgia

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant and third party defendant-appellant pay to defendant-appellee, plaintiff-appellee, and defendant-third party plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

December 28, 1971

DYER, Circuit Judge, dissenting.
Issued As Mandate:

Order of Court of Appeals Staying Mandate

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-1515

RANGER INSURANCE COMPANY,
Plaintiff-Appellant,

versus

MRS. MIRIAM G. CULBERSON, *as Executrix of the Estate of W. A. Culberson,*
Defendant-Appellee,

CAROL BROWN MACLEAN, *as Executrix,*
Plaintiff-Appellee,

versus

MIRIAM G. CULBERSON, *as Administratrix,*
Defendant-Third Party Plaintiff-Appellee,

versus

RANGER INSURANCE COMPANY
Third Party Defendant-Appellant.

ON CONSIDERATION OF THE APPLICATION of the plaintiff-appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable plaintiff-appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a

period of 74 days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 74 days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition has been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 74 days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

/s/ IRVING L. GOLDBERG
United States Circuit Judge

Dated: February 11, 1972

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

February 14, 1972

Edward W. Wadsworth
Clerk
Room 408—400 Royal St.
New Orleans, La. 70130

Mr. Sewell K. Loggins
Attorney at Law
4000 First National Bank Tower
Atlanta, Georgia 30303

No. 71-1515—Ranger Ins. Co. vs. Mrs. Miriam G. Culberson, etc., and Carol Brown MacLean,
Mandate Stayed to: April 25, 1972
(See Order Enclosed)

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and

therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and order denying rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

EDWARD H. WADSWORTH, Clerk

By CLAUDETTE STAIGER
Deputy Clerk

enc.
cc and enc. (Copy of Order):
Mr. Robert D. Feagin, III
Mr. Glover McGhee
Messrs. Pindar, McElroy, Connell & Foley
Mr. Alan J. Konigsberg

P. S. to Mr. Loggins: I have already sent you a copy of the opinion judgment, and order denying rehearing on February 11, 1972.

APPENDIX B

Opinion of the Georgia Court of Appeals

IN THE

COURT OF APPEALS

OF

GEORGIA

No. 46478

THE FARMERS AND MERCHANTS BANK OF MANCHESTER

versus

RANGER INSURANCE COMPANY

DECEMBER 10, 1971

JORDAN, Presiding Judge. This is an action by the owner and lienholder of an aircraft against an insurer to recover for the loss in a crash on June 27, 1970. The plaintiffs appeal a summary judgment for the insurer.

The facts are stipulated and undisputed. The named insured, John C. Loftin, was operating the aircraft at the time of the loss, and was carrying a passenger. He held a student pilot certificate, and under Federal Aviation Regulation § 61.73(a) (1) a student pilot may not act as pilot in command of an aircraft carrying a passenger.

The presence of a passenger had no casual connection with the loss, but the insurer denied coverage on the basis that the policy excluded coverage during a flight with a student pilot in command while carrying a passenger, relying on the following provisions of the policy:

"EXCLUSIONS

"This policy does not apply:

"2. to any occurrence or to any loss or damage occurring while the aircraft is operated in flight by other than the pilot or pilots set forth under item 7 of the Declarations;

"DECLARATIONS

"7. PILOT CLAUSE: Only the following pilot or pilots holding valid and effective pilot and medical certificates with ratings as required by the Federal Aviation Administration for the flight involved will operate the aircraft in flight: "JOHN C. LOFTIN: OTHERWISE, ANY PRIVATE OR COMMERCIAL PILOT HAVING A MINIMUM OF 300 TOTAL LOGGED HOURS."

While § 56-2439 of the Insurance Code, Ga. L. 1968, p. 1414, expressly prohibits the issuing or delivering in this State of an insurance contract covering the loss of an aircraft which excludes or denies coverage because the aircraft is operated in violation of Federal, State, or local civil air regulations, the exceptions as stated in this statute include exclusions or conditions with respect to pilot certification by the FAA, pilot experience, and limitations on the use of the aircraft. In our opinion the contractual provisions here involved are clearly within the exceptions under § 56-2439, not only in relation to pilot certification by FAA and pilot experience, but also as limiting the use of the aircraft by restricting the operation in flight to a pilot or pilot meeting stated qualifications.

We also think the provisions of the policy are clear, and require no construction, to reach the conclusion that the pilot clause as a whole applies to John C. Loftin. He, as well as any private or commercial pilot having 300 total logged hours, was authorized to operate the aircraft in flight, only if he held a valid pilot certificate *"for the flight involved."* The flight here involved was one with a passenger, not covered by his student pilot certificate, and expressly excluded from the coverage afforded by the policy. See, to the same effect, National Insurance Underwriters v. Bequette, (USDC, Alaska) 280 F. Supp. 842.

Judgment affirmed. Bell, C. J., Hall, P. J., Eberhardt, Pannell, Deen, and Quillian, JJ., concur. Evans, J., dissents. Whitman, J., not participating due to illness.

EVANS, Judge dissenting. In 1968 the General Assembly of Georgia amended Chapter 56-26 of the Code (Title 56, Code of 1933, as amended; Ga. L. 1968, pp. 1414, 1415) to add a new Section thereto (§ 56-2439), having for its announced purpose the prohibiting of insurers from excluding or denying coverage in insurance contacts "because an aircraft has been operated in violation of Federal, State or local law." Of course, this law would authorize certain specific exclusions or conditions in the policy as to certain matters therein set forth. Section 56-2439 reads as follows:

> "No policy of insurance issued or delivered in this State covering any loss, expense or liability arising out of the ownership, maintainance or use of an aircraft shall exclude or deny coverage because the aircraft is operated in violation of civil air regulations pursuant to Federal, State or local laws or ordinances.

"This section does not prohibit the use of specific exclusions or conditions in any such policy which relates to any of the following:

"(a) Certification of an aircraft in a stated category by the Federal Aviation Administration.

"(b) Certification of a pilot in a stated category by the Federal Aviation Administration.

"(c) Establishing requirements for pilot experience.

"(d) Establishing limitations on the use of the aircraft."

In complete disregard of this statute, the Ranger Insurance Company, on the 10th day of January, 1970, issued a policy of insurance on an aircraft owned by John C. Loftin with a loss payable clause in favor of Farmers and Merchants Bank of Manchester, Georgia.

It is well settled that a policy of insurance which is written in violation of the laws of Georgia will be construed as if such offensive language were not in the policy, since existing and valid statutory provisions enter into and form a part of all contracts of insurance to which the statute is applicable. Gulf American Fire & Cas. Co. v. McNeal, 115 Ga. App. 286, 292 (4) (154 SE2d 411); Employer Liability Assurance Corp. v. Hunter, 184 Ga. 196, 202 (190 SE 598); Nelson v. Southern Guaranty Ins. Co., 221 Ga. 804, 807 (147 SE2d 424). Section 56-2439 was therefore a part of the policy issued on January 10, 1970.

The exclusionary language in the policy which violates the Georgia statute, and which must be completely disregarded in determining the rights of the insured and the insurer, is as follows:

"Pilot Clause: Only the following pilot or pilots holding valid and effective pilot and medical certifi-

> cates *with ratings as required by the Federal Aviation Administration for the flight involved* will operate the aircraft in flight. JOHN C. LOFTIN: otherwise, any private or commercial pilot having a minimum of 300 total logged hours." (Emphasis added)

The majority opinion holds that because the pilot and owner had only a student's license and had a passenger in the plane at the time of the mishap, and that he was thus not complying with Federal regulations, that there is no insurance coverage in this case. To this I cannot agree. This conclusion can be reached only by disregarding the mandate of the Georgia statute of 1968, to wit: Code Ann. § 56-2439, supra. Of course, *specific* exclusions were authorized under the law as to pilot experience and use of the aircraft, as well as certificates of a pilot or aircraft in a stated category by the Federal Aviation Administration, but this was not done here. (See the exact language set forth above). Rather than *specific* exclusions, this policy sought to set forth a *general* exclusion, to wit: "as required by the Federal Aviation Administration for the flight involved," which is a *general*, and not a *special* exclusion, and is a catch-all clause to cover a multitude of sins. The law specifically states this general exclusion will no longer be allowed in aircraft policies. The only way insurance coverage can be disallowed under this policy is by taking the following language from the pilot certificate, "student pilots are prohibited from carrying passengers," and thereby void the policy because Loftin had violated Federal Aviation Administration regulations. This cannot be done under the policy where *specific* exclusions authorized by the 1968 statute (Code Ann. 56-2439, supra) have not been used in the policy, but instead, *general* exclusions, requiring "valid and effective pilot and medical certificate

with ratings *as required by the Federal Aviation Administration for the flight involved*" have been inserted in the policy.

I, therefore, dissent because this policy is violative of the above law, and the general exclusionary language in the policy must be completely disregarded in determining the rights of the insured. I would reverse the judgment granting the motion for summary judgment in favor of the defendant Ranger Insurance Company.